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# Report of the International Law Commission on the work of its fifty-seventh session (2005)

## Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixtieth session, prepared by the Secretariat

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# Introduction

1. At its sixtieth session, the General Assembly, on the recommendation of the General Committee, decided at its 17th plenary meeting, on 20 September 2005, to include in its agenda the item entitled "Report of the International Law Commission on the work of its fifty-seventh session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 11th to 20th and 22nd meetings, from 24 to 31 October, and 1 to 3 and 16 November 2005. The Chairman of the International Law Commission at its fifty-seventh session introduced the report of the Commission: chapters I to III, VI, VIII and XII at the 11th meeting, on 24 October; chapters IV, IX and X at the 13th meeting, on 26 October; and chapters V, VII and XI at the 17th meeting, on 31 October. At the 22nd meeting, on 16 November 2005, the Sixth Committee adopted draft resolution A/C.6/60/L.14, entitled "Report of the International Law Commission on the work of its fifty-seventh session". The draft resolution was adopted by the General Assembly at its 53rd plenary meeting, on 23 November 2005, as resolution 60/22.

3. By paragraph 19 of resolution 60/22, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the sixtieth session of the Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document consists of nine sections: A. Shared natural resources; B. Effects of armed conflicts on treaties; C. Responsibility of international organizations; D. Diplomatic protection; E. Expulsion of aliens; F. Unilateral acts of States; G. Reservations to treaties; H. Fragmentation of international law: difficulties arising from the diversification and expansion of international law; and I. Other decisions and conclusions of the Commission.

# Topical summary

## A. Shared natural resources

### 1. General comments

5. Delegations welcomed the Commission's current work on the sub-topic "transboundary aquifers"; water was essential for human survival and groundwaters represented the bulk of the world's freshwater supply; such a resource was often shared, pointing to the need for international regulation on the basis of international law.

6. Some delegations looked forward to the consideration of the other aspects of the overall topic, noting in anticipation that the current focus would soon embrace a discussion on oil and gas. There was a concern that the split into sub-topics had already precluded the possibility of developing a comprehensive set of rules governing all shared natural resources. The point was made that due attention should be given to the relationship between aquifers and oil and gas before the Commission has completed the first reading of the draft articles rather than before the second reading, as suggested by the Special Rapporteur. Given the different characteristics of such resources, some other delegations were hesitant that the

principles developed for aquifers would apply in their entirety to oil and gas, or whether the Commission should even deal with oil and gas.

7. Some delegations remained concerned with the overall title of the topic, viewing it as misleading and suggested that "Transboundary natural resources" might better reflect the transboundary focus. To others, the title projected questions of shared sovereignty or common heritage of mankind; its use in any eventual instrument was therefore problematic. However, some other delegations considered the acceptance of the shared character of a particular regime as not intended to internationalize or universalize it.

8. The Special Rapporteur was commended for submitting a complete set of draft articles on the law on transboundary aquifers; and for taking a flexible framework approach, which could be adapted through bilateral or regional agreements, and which followed in the Commission's previous work on the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses. The Special Rapporteur was equally commended for consulting groundwater experts in the elaboration of the draft articles and was urged to include other bodies such as the United Nations Environment Programme.

9. Several delegations were mindful of the paucity of State practice on the current sub-topic and urged the Commission to focus on its progressive development and elaborate provisions by analogy, using the 1997 Convention as a frame of reference, while taking into account contemporary practice and environmental principles of sustainable development, including principle 2 of the Rio Declaration on Environment and Development, as well as juridical and institutional developments in various regions. Particular attention was drawn to the practice of States regionally, including developments within the context of the Guarani aquifer (Argentina, Brazil Paraguay and Uruguay). Indeed, the three basic principles — sovereignty, use and environmental protection of the aquifer on which the Guarani aquifer States based their collaboration — could be germane in the consideration of the draft articles.

10. Some delegations welcomed the fact that the draft articles had usefully identified relevant principles such as the principles of equitable and reasonable utilization; the obligation not to cause significant harm; the obligation of aquifer States to cooperate; adequate protection of a transboundary aquifer; and the regular exchange of data and information, which were recognized in instruments on the use of surface water resources. For some, the principles of equitable and reasonable utilization offered the best means of avoiding disagreements between States with varying notions of sovereignty over natural resources. The changes and additions proposed by the Special Rapporteur added precision to the draft articles from the hydrological and geological standpoint and clarified the framework in which the sustainability of groundwater resources would be addressed. Indeed, some delegations indicated their endorsement of the general principles as set out in the draft articles.

11. On the other hand, some delegations pointed to the inherent difficulty in, and questioned the wisdom of, employing as a model the 1997 Convention, which had not been adopted by consensus and had not yet entered into force. The view was also expressed that the status of the 1997 Convention pointed to the imperative to revisit the framework approach. Moreover, the draft articles did not seem to be supported by sufficient State practice. Given the complexity of the topic and the

widely varying State practice on the matter, the point was made that context-specific arrangements were the best way to address pressures on transboundary groundwaters.

12. In order to encourage wider support for the draft articles, the comment was also made that reliance on the 1997 Convention should be balanced with other approaches. One aspect worth reconsidering concerned allocation of groundwaters on the basis of "equitable and reasonable utilization", which seemed to run counter to other pre-existing formulas of allocation.

13. Some other delegations stressed the importance of recognizing that a different legal framework was required for groundwaters, which should be respectful of their environmental features and vulnerability and take into account the need to protect and preserve their ecosystem.

14. Several delegations commended the work accomplished by the 2005 Working Group on Shared Natural Resources; supported its reconvening in 2006 and expressed the hope that the Commission would finalize work on the draft articles, bearing in mind the convening in 2006 of the Fourth World Water Forum, to be held in Mexico.

### 2. Structure of the draft articles

15. Some delegations agreed with the approach of the Special Rapporteur that the utilization and management of a transboundary aquifer were matters solely for the States in which the aquifer was situated and that under no circumstances should such aquifers be under international or universal jurisdiction. Indeed, it was noted that the draft articles should not cover the obligations of non-aquifer States. It was observed that the main purpose of the draft articles was to provide a framework for the elaboration of legally binding agreements between States that shared groundwater resources, emphasizing bilateral and regional cooperation; the establishment of joint mechanisms, commissions and monitoring.

16. While noting that the draft articles appropriately focused on the obligations of aquifer States, some other delegations suggested that it might be useful to include general duties applicable to all States in order to recognize the wider international dimension of the sub-topic. Such a structure would reflect a flow from the general to the specific, a format followed in a number of other international regimes on environmental questions.

17. Although the draft articles took a framework approach, some delegations stressed that the draft articles ought to be normative, binding and carefully couched in precise legal language.

18. It was also noted that the criteria of rechargeability, non-negligibility and contemporaneity in respect of a recharging and a non-recharging aquifer merited further analysis so that appropriate rules could be elaborated accordingly; the distinction between a recharging and a non-recharging aquifer may need further elaboration with regard to utilization; the meaning of "equitable and reasonable" in draft article 5; its factors in draft article 6; the applicable threshold for causing harm in draft article 7, as well as the general duty to cooperate in draft article 8.

### 3. Relationship between the draft articles and the 1997 Convention

19. To avoid overlap, some delegations stressed the need to clarify the relationship between the draft articles and the 1997 Convention, which covers groundwaters linked to a watercourse when they constitute by virtue of their physical relationship a unitary whole and normally flow into a common terminus. The draft articles could: (a) be limited to confined aquifers, or systems with a negligible linkage with surface waters, which did not fall under the 1997 Convention; (b) focus on legal rules on the use of groundwaters that differed from the 1997 Convention; or (c) be given special status, enjoying priority over other international agreements.

### 4. The principle of sovereignty and permanent sovereignty over natural resources

20. Some delegations welcomed the proposal by the 2005 Working Group on Shared Natural Resources for a specific draft article spelling out the sovereignty of States over the part of an aquifer situated in their territory.

21. Some other delegations favoured an explicit reference to the principle of permanent sovereignty over natural resources as set out in General Assembly resolution 1803 (XVII) of 14 December 1962. Moreover, it should be made clear that groundwaters were not a common heritage of humankind.

### 5. Specific comments on some draft articles

#### (a) Preamble

22. It was suggested that a reference be made (a) that aquifer States should have due regard to international law and international legitimacy; (b) to the precautionary principle, along the lines of a similar preambular paragraph in the Convention on Biological Diversity; and (c) to General Assembly resolution 1803 (XVII).

#### (b) Draft article 1. Scope of the present Convention

23. While priority should be given to utilization and the protection, preservation and management of aquifers by aquifer States, bearing in mind their fragility, the point was made that vital human needs should be an additional priority consideration.

24. Although there was support for paragraph (b) as formulated, the viewpoint was expressed that the further qualification of "impact" and "likely impact" was unnecessary; they raised relationship questions with the term "significant harm". It was also suggested that activities contemplated in subparagraph (c) should be covered only insofar as they were related to the rights of utilization of other aquifer States.

#### (c) Draft article 2. Use of terms

25. Some delegations noted that definitions in draft article 2, including of "aquifer" and "aquifer system" as reformulated, in particular the inclusion of "geological formation" and the deletion of "exploitability" were clearer from a technical and a legal standpoint.

26. In the view of some delegations, the distinction between a recharging and a non-recharging aquifer was necessary, and was in line with the principles of sustainable development.

27. It was also remarked that the possibility of defining other terms should not be entirely precluded, with some delegations noting that the use of such a broad range of terms as "impact" in draft article 1 (b), "detrimental impacts" in draft article 13, "adverse effects" in draft article 16, "significant adverse effect" in draft article 17 and "serious harm" in draft article 19 might require clarification.

### (d) Draft article 3. Bilateral and regional arrangements

28. Some delegations supported the flexible non-definitive language in paragraph 1 as well as the inclusion of all relevant aquifer States in the negotiation and conclusion of arrangements. However, the failure by some States to participate in good faith in such negotiations should not prevent the others from concluding the necessary arrangements among themselves. Some other delegations sought clarification as to the meaning of the phrase "to a significant extent"; while others expressed doubts about the use of the term "arrangement". It seemed improper to accord priority to non-binding instruments, when States should be encouraged to enter into binding agreements. Instead, the corresponding language of article 3 of the 1997 Convention was preferred.

29. Some delegations stressed the importance of ensuring compatibility between the draft articles and bilateral and regional arrangements. In order to ensure that such arrangements were concluded within the framework of the draft articles, the deletion of "consider" in paragraph 2 was suggested. It was also noted that it would be more logical to provide clearly for the harmonization in paragraph 2 to apply to future agreements while restricting the application of paragraph 3 to existing agreements.

30. The possibility that bilateral and regional arrangements would prevail over the general provisions of the draft articles was considered as useful; and it was proposed that paragraph 3 should make it clearer that in the event of conflict such arrangements prevailed over the draft articles.

### (e) Draft article 4. Relation to other conventions and international agreements

31. The comment was made that paragraph 1 would be meaningless unless all parties to the instrument to be adopted were also parties to the 1997 Convention. Some delegations observed that there appeared to be an overlap and conflict between paragraph 3 of draft article 3 and paragraph 2 of draft article 4; it was unclear whether the agreements referred to in the latter regulated matters other than groundwaters, and no distinction was made between present and future agreements. Some other delegations nevertheless welcomed the fact that paragraph 2 of draft article 4 employed the language of paragraph 2 of article 311 of the United Nations Convention on the Law of the Sea.

### (f) Draft article 5. Equitable and reasonable utilization

32. Some delegations welcomed draft article 5 as reformulated by the 2005 Working Group on Shared Natural Resources. Recalling that the principles embodied in the corresponding article 5 of the 1997 Convention had posed problems

during the negotiation of that Convention, the view was expressed that it would be inappropriate to extrapolate the application of such "riparian rights" to groundwaters.

33. With regard to paragraph 2 (b) proposed by the Special Rapporteur, it was suggested that the conclusion of an agreement between the aquifer States should be a prerequisite for any use of a non-recharging aquifer; otherwise its unilateral use would entail the risk of diminishing the potential benefits for the other aquifer States.

### (g) Draft article 6. Factors relevant to equitable and reasonable utilization

34. In view of the distinction in draft article 5 between reasonable and equitable utilization, the point was made that where feasible draft article 6 should indicate which factors applied to each principle. With regard to the specific factors, it was suggested that special consideration be given to the characteristics and special uses of each aquifer; and to preservation of good water quality. It was also noted that non-exercise by an aquifer State of its right to utilize an aquifer should not prejudice the right of the other aquifer States to utilize it on the ground that such utilization would be inequitable.

### (h) Draft article 7. Obligation not to cause harm

35. Some delegations expressed support for the retention of the threshold "significant" harm; it was a familiar term used in a number of international instruments. The point was nevertheless made that it would be difficult to agree on a term such as "significant harm" unless specific types of harm were identified. Some other delegations preferred a lower threshold of "harm", noting that "significant" harm was too high a threshold, especially for non-recharging aquifers. The view was expressed that the term "impact" qualifying "other activities" in paragraph 2 was unnecessary and confusing.

36. With regard to paragraph 3, some delegations preferred a further development of the provisions concerning compensation for harm caused to another aquifer State. Since compensation arose in a situation in which harm occurs despite the taking of all the measures of prevention and did not give rise to State responsibility, it was suggested that such an understanding be clarified in the paragraph. Some other delegations objected to the possibility that the question of compensation would be a subject of discussion by the parties concerned; such an approach did not take into account the progress made by the Commission on the question of compensation in recent years, including its draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. It was suggested that it would be more appropriate to conceive compensation on the basis of the "polluter pays" principle. Indeed, the point was made that the obligation to provide compensation be formulated in binding terms.

37. Some delegations supported the approach proposed by the Special Rapporteur noting that the questions of liability and responsibility were properly addressed in other instruments. The point was also made to entirely delete paragraph 3.

38. It was also suggested that draft article 7 should make clear that an aquifer State which exercised its right to utilize an aquifer per se, without taking any other measures that had adverse effects should not be regarded as causing significant

harm to the other aquifer States, even if the other aquifer States were not exercising their rights.

#### (i) Other draft articles

39. Some delegations endorsed the principles set out in draft article 9 (Regular exchange of data and information); the current formulation of draft article 10 (Monitoring); endorsed the use of the word "encouraged" in draft article 14 (Prevention, reduction and control of pollution); supported the obligations contained in draft article 16 (Assessment of potential effects of activities), as well as draft articles 17 (Planned measures); 18 (Scientific and technical assistance to developing countries); 19 (Emergency situations), and 20 (Protection in time of armed conflict). It was also suggested that there should be a provision on recourse to arbitration and detailed provisions on the institutional framework for cooperation.

40. Some other delegations also suggested: the reconsideration of draft article 8 (General obligation to cooperate); the deletion of "harmonized" in paragraph 1 of draft article 10 since it might be construed as imposing universally applicable standards and methodologies for monitoring; an explicit reference in draft article 13 (Protection of recharge and discharge zones) that the draft articles did not impose obligations on non-parties; more elaborate provisions, with regard to draft articles 16 and 17, along the lines of articles 11 to 19 of the 1997 Convention, noting that an environmental impact assessment should be obligatory; that draft article 18 should include aspects concerning transfer of technology, justifying the retention of the draft article as a whole as based on international law on development, which recognizes that relations between States should take into account different levels in their development; that the protection offered under draft article 21 (Data and information vital to national defence and security) should extend to protections on the basis of national interest, and should cover industrial secrets and intellectual property.

41. With respect to draft article 14, several delegations, acknowledging the priority required to prevent, reduce and control pollution, expressed preference for stronger wording and stressed the importance of reflecting the precautionary principle as opposed to the "precautionary approach" as proposed by the Special Rapporteur. Some other delegations viewed the approach taken by the Special Rapporteur as more realistic, and not an obstacle to economic and scientific activity.

### 6. Form of final instrument

42. Some delegations agreed with the Special Rapporteur that at the current stage of its work the Commission should focus on substance without prejudice as to the final form; the wording could be adjusted depending on the choice that will finally be made. Some other delegations noted that the presentation of draft articles already seemed to leave little doubt that a binding instrument was the preferred final form. Indeed, a framework convention was the preferred choice of some delegations.

43. Some other delegations viewed the status of the 1997 Convention as an important consideration in making a determination on the final form. Thus, there was preference for recommendatory principles or guidelines to help States to negotiate bilateral or regional arrangements rather than a binding instrument. Moreover, considering that the Commission's work on the topic did not amount to codification, declaratory articles were perceived to be inappropriate. Some

delegations preferred the elaboration of a model regional convention that would be acceptable to all States in a given region.

## B. Effects of armed conflicts on treaties

### 1. Introduction

44. While the Commission was congratulated on the work undertaken at its fifty-seventh session on the topic, it was pointed out that much work remained to be done. The Commission was encouraged to adopt a draft instrument on the subject in the near future. Some delegations expressed doubts about the utility of the topic.

45. It was noted that, since the subject was dominated by doctrine and practice was sparse, it would be necessary to study State practice in a variety of legal systems before any acceptable standards could be identified. Several delegations concurred with the suggestion that a written request for information, possibly in the form of a questionnaire, be circulated to Member States. The Secretariat was further commended for its memorandum on the topic.

### 2. General remarks

46. General support was expressed for the Special Rapporteur's view that the topic should form part of the law of treaties, and not part of the law relating to the use of force. Support was also expressed for the policy of clarifying the legal position in respect of the effects of armed conflicts on treaties and promoting the security of legal relations between States; and for the proposition that continuity of treaty obligations in armed conflict should be encouraged in cases where there was no genuine need for suspension or termination. At the same time, the view was expressed that the effect of an armed conflict on a treaty would very much depend on the specific provisions of that treaty, its nature and the circumstances in which it had been concluded.

47. In addition, the Special Rapporteur's approach of seeking compatibility with the Vienna Convention on the Law of Treaties of 1969,[1] was welcomed , although it was noted that a textual reference to particular articles of the Convention might not always be appropriate. At the same time, it was observed that the subject was also closely related to other domains of international law, such as international humanitarian law, self-defence and State responsibility. The Special Rapporteur was encouraged to also consider those relationships in his reports.

### 3. Draft article 1. Scope

48. Several delegations expressed support for including treaties concluded by international organizations within the scope of the topic, since such organizations were affected by the application of treaties in wartime and a State or the organization itself might incur responsibility as a result of the wrongful suspension or termination of certain treaty obligations. Others preferred to restrict the scope of its work to agreements between States since attempting to cover international organizations in the draft articles would make them more complicated and perhaps unmanageable.

[1] United Nations, *Treaty Series*, vol. 1155, p. 331.

49. With regard to the question whether the draft articles should cover solely treaties in force at the time of the armed conflict or also treaties that had not yet entered into force, the view was expressed that, since article 25 of the Vienna Convention on the Law of Treaties allowed for the provisional application of treaties, it seemed advisable that the draft articles should apply to treaties that were being provisionally applied. A preference was also expressed for including within the scope of the topic treaties that become operative only during an armed conflict, since such treaties cover a wide variety of topics and their provisions should be enforced unless genuinely impossible to do so.

### 4. Draft article 2. Use of terms

50. A range of views were expressed concerning the term "armed conflict", in paragraph (b). As regards the inclusion of non-international armed conflict, it was maintained that the draft articles should apply to any armed conflict, international or non-international, regardless of whether war had been declared. It was pointed out that a new wave of non-international armed conflicts, in recent times, necessitated further reflection on the impact of such conflicts on bilateral and multilateral treaties. It was suggested that the definition formulated by the International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case[7] could be resorted to.

51. Several other delegations were of the view that internal armed conflicts should be excluded from the scope since they would not have any effect on treaties concluded between the State in which the conflict was taking place and other States. It was maintained, inter alia, that a broad definition of "armed conflict" was more likely to jeopardize than to strengthen treaty relations, since it would inevitably raise the question of how such conflicts should be defined and how the other State party to a treaty could ascertain whether or not such a conflict existed. Moreover, it was observed that the proposed definition of armed conflict overlooked the fact that belligerents were frequently reluctant to recognize a state of war, and that States were sometimes reluctant to admit that they were engaged in an armed conflict.

52. Other suggestions included employing the term "hostilities", which appeared in article 73 of the Vienna Convention on the Law of Treaties; considering a broader notion of conflict such as that reflected in chapter IV of the report of the High-level Panel on Threats, Challenges and Change;[8] employing a strictly legal test applied to the factual situation which would not be dependent on recognition of the existence of such conflict by the participants; adopting a simpler formulation, stating that the articles applied to armed conflicts, whether or not there had been a declaration of war, or which did not draw a distinction between international and non-international armed conflicts, nor make any reference to the "nature or extent" of armed operations; or not having a definition at all.

53. Some support was also expressed for including military occupations, even if they were not accompanied by protracted armed violence or armed operations, blockades and territories placed under international administration in the definition.

[7] Case IT-94-1, *Prosecutor v. Dusko Tadic a/k/a "DULE"*, Appeals Chamber, 2 October 1995 (1994-1995) 3 ICTY JR 352, at para. 70. See also 35 I.L.M. (1996) 32.

[8] See A/59/565 and Corr.1.

### 5. Draft article 3. Ipso facto termination or suspension

54. Several delegations expressed agreement with the proposition that an outbreak of an armed conflict did not ipso facto terminate or suspend the operation of treaties. It was maintained that compliance with that principle would contribute to the stability of treaty relations by adhering to the basic principle of *pacta sunt servanda*, and as such constituted the point of departure for the whole set of draft articles. In terms of a further view, the article was not strictly necessary, since the principle of continuity was implied by draft articles 4 to 7. At the same time, it was proposed that it be clarified that the implication of continuity did not affect the position with regard to the law of armed conflict as the *lex specialis* applicable in times of armed conflict, even though continuity might suggest the concurrent application of different standards.

55. Other delegations expressed doubts that such continuity of treaty relations had been consolidated as a principle of international law, and it was suggested that even if there were convincing practice as to the continuity of treaties, a general principle of continuity seemed unrealistic. Furthermore, in certain situations, the outbreak of an armed conflict would indeed cause the termination or suspension of a treaty ipso facto, for example in the case of a bilateral political or military alliance treaty. Some delegations also endorsed the Special Rapporteur's suggestion that the term "ipso facto" be replaced by "necessarily", to make the provision less categorical.

56. Support was also expressed for the suggestion that the position of third parties be clarified in the text. The view was expressed that the question of the effects of hostilities with regard to a third State not a party to the conflict probably did not call for special rules, since the law of treaties already provided grounds for termination or suspension of the operation of a treaty, such as a supervening impossibility of performance or a fundamental change of circumstances.

### 6. Draft article 4. The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict

#### (a) Paragraph 1

57. Several delegations expressed support for the criterion of intention in determining whether a treaty should be terminated or suspended at the outbreak of an armed conflict. It was observed that treaty obligations were essentially contractual obligations and the intent underlying a contract had a bearing on the extent and manner of its operation. Others expressed doubts about the test of intention. It was pointed out that when States concluded a treaty, they did not generally anticipate or make arrangements for its application during armed conflict.

58. Support was also expressed for taking the nature, object and purpose of the treaty into account. Other suggestions included taking into account the preparatory work of the treaty, the circumstances of its conclusion, the character of specific provisions, how it had been previously implemented, and the situation after the outbreak of armed conflict; as well as requiring the express intention of the parties.

#### (b) Paragraph 2, subparagraph (a)

59. The view was expressed that since, generally speaking, treaties contained no reference, even implicitly, to the intention of the parties concerning the termination

or suspension of the treaty in the event of an armed conflict, the action that needed to be taken to ascertain whether there had been an agreement in that regard between the parties could not be considered "interpretation" of the treaty, and, accordingly articles 31 and 32 of the Vienna Convention would not be applicable.

### (c) Paragraph 2, subparagraph (b)

60. Some delegations expressed doubts as to whether the nature and extent of an armed conflict should be a factor in determining the intention of the parties at the time of conclusion of the treaty, since such an intention would pre-date the conflict.

### (d) General remarks

61. It was observed that, although the draft article referred to susceptibility to suspension or termination, none of the subsequent provisions explicitly defined the legal consequences thereof. It was thus suggested that the draft article needed further elaboration, including even being split into several provisions.

62. A proposal was made for the reformulation of draft article 4:

> "1. Where a treaty indicates the intention of the parties relating to the termination or suspension of the treaty in case of an armed conflict, or where such intention may be deduced from the interpretation of the treaty, that intention shall stand.
>
> 2. In any other case, the intention of the parties to a treaty with regard to its termination or suspension in case of an armed conflict shall, in the event of disagreement between the parties in that regard, be determined by any reasonable means, which may include the *travaux préparatoires* of the treaty or the circumstances of its conclusion.
>
> 3. The foregoing shall be without prejudice to any decision that the parties may, by mutual agreement and without a breach of *jus cogens*, make at any time."

## 7. Draft article 5. Express provisions on the operation of treaties

### (a) Paragraph 1

63. Several delegations suggested that reference should be made in the provision to the principle enunciated by the International Court of Justice, in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*,[4] to the effect that, while certain human rights and environmental principles did not cease to apply in time of armed conflict, their application was determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which was designed to regulate the conduct of hostilities.

### (b) Paragraph 2

64. A view was expressed that the paragraph did not belong within the article, and that, for the sake of clarity, it could be placed in a separate article.

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[4] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports*, 1996, p. 226 at 240, para. 25.

### 8. Draft article 6. Treaties relating to the occasion for resort to armed conflict

65. Support was expressed for the proposition that it was unreasonable to presume that a treaty which served as the basis of an armed conflict, and which later was the subject of some process in accordance with law, should be assumed to be annulled. In terms of a further view, although the draft article appeared to be simply an application of the principle already stated in draft article 3, and therefore superfluous, the provision bore independent repetition in order to do away with any risk of presuming that a treaty that had given rise to an armed conflict was null and void.

### 9. Draft article 7. The operation of treaties on the basis of necessary implication from their object and purpose

#### (a) Paragraph 1

66. The view was expressed that paragraph 1 was inaccurate because the treaties envisaged therein did not "continue in operation" during an armed conflict but rather "became operative" during such a conflict.

#### (b) Paragraph 2

67. Several delegations expressed doubts as to the inclusion of an indicative list of treaties. It was maintained that such approach would prove controver[illegible]l, especially since treaties did not automatically fall into one of several categories, and that a clearer indication of State practice and case law was required to support the inclusion of most of the categories of treaty mentioned in the paragraph. It was considered more useful, for the guidance of States, to enumerate the factors that might lead to the conclusion that a treaty or some of its provisions should continue or should be suspended or terminated in the event of armed conflict. It was also suggested that the list could better be included in the commentary, and that it be presented as merely indicative.

68. As regards paragraph 2, subparagraph (b), a preference was expressed for including treaties creating or modifying boundaries. It was also suggested that some of the categories, like that of "multilateral law-making treaties", in subparagraph (g), be made more specific, and doubts were expressed whether some categories, such as treaties relating to the environment, ought to figure in the list at all. In terms of a further suggestion, the Charter of the United Nations, in particular Article 103 thereof, could be included in the list.

### 10. Draft article 8. Mode of suspension or termination

69. A view was expressed that it was not clear whether the concepts of suspension and termination should be dealt with in a single article, since their legal effects might be different.

### 11. Draft article 9. The resumption of suspended treaties

70. It was observed that while it would seem logical once the conditions that had given rise to a suspension of a treaty no longer existed to revert to full implementation of the treaty concerned, in practice the parties might have different views which would need to be settled by agreement.

### 12. Draft article 10. Legality of the conduct of parties

71. Some delegations supported the Special Rapporteur's view that the draft articles should not deal with the legality of armed conflicts. It was pointed out that the topic was distinct from that of the legality of the use of force, and that terminating or suspending a treaty simply on the basis of the assertion that force had been used illegally was likely to be inimical to the stability of treaty relations.

72. Some other delegations called for the provision to be reconsidered since the legitimacy of the use of force did have a bearing on treaty relations. It was pointed out that a State acting in exercise of the right to self-defence or in accordance with a Security Council decision should be able to terminate treaties incompatible with that right or that decision. Conversely, a State which used force in violation of the Charter of the United Nations could not be in the same situation as that of the State which was the victim of its actions. The concern was expressed that the article could be interpreted as giving an aggressor State the right to suspend or terminate certain treaties, thereby assisting it in an unlawful act. It was further suggested that consideration be given to the relevant provisions of the 1985 resolution of the Institute of International Law.

### 13. Draft article 11. Decisions of the Security Council

73. A view was expressed that the draft article might trigger controversy over whether the Security Council could order the termination or suspension of treaty obligations, which should not be dealt with in the draft articles.

## C. Responsibility of international organizations

### 1. General comments

74. Delegations welcomed the third report of the Special Rapporteur on the topic, as well as the draft articles and commentaries adopted by the Commission at its fifty-seventh session.

75. Some delegations noted that the topic was complicated by the diversity of international organizations and the paucity of relevant practice. Hope was expressed that States and organizations would supply the Special Rapporteur and the Commission with further examples of national practice and case law to be reflected in the commentaries. The Commission was cautioned against relying too heavily on the practice of the European Community.

76. Several delegations expressed support for the Commission's approach in elaborating the draft articles on the basis of the 2001 articles on Responsibility of States for Internationally Wrongful Acts,[5] although they could serve only as a starting point when considering the responsibility of international organizations. Concern was expressed that the draft articles provisionally adopted at the fifty-seventh session followed the articles on State responsibility too closely.

77. A number of delegations made other suggestions with regard to future work on the draft articles, including (a) limiting the topic to questions relating specifically to

[5] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 and corrigendum* (A/56/10 and Corr.1), p. 43.

international organizations; (b) excluding regional integration organizations from the scope of application of the draft articles; (c) examining the possibility of apportioning responsibility between member States; (d) including some articles that, mutatis mutandis, reflected articles 8 and 9 of the articles on State responsibility;[6] (e) redrafting some of the subheadings in order to match the articles on State responsibility; and (f) developing an implementation mechanism for the draft. With regard to circumstances precluding wrongfulness, the point was made that while the concepts of necessity and coercion should apply to international organizations, self-defence might prove problematic. In terms of the final form, it was recommended that the General Assembly take note of the draft articles on the responsibility of international organizations, but not adopt them as a binding legal instrument.

### 2. Draft article 1 — Scope of the present draft articles

78. While support was expressed for draft article 1, concern was also expressed regarding the attribution of responsibility to a State for a wrongful act committed by the international organization.

### 3. Draft article 2 — Use of terms

79. With regard to draft article 2, some delegations were of the view that the term "other entities" required further elaboration and made the definition of international organization too broad. On the other hand, support was also voiced for the position that an international organization could include entities other than States as members.

### 4. Draft article 3 — General principles

80. Some delegations expressed agreement with the proposition that a wrongful act of an international organization could consist of either an act or an omission. However, it was pointed out that whether an omission of an international organization constituted an internationally wrongful act would fundamentally depend on whether the organization was explicitly obliged under international law to take action. A preference was expressed for draft article 3 to provide explicitly for the responsibility of international organizations for the acts of their member States in certain cases, in line with draft article 15, and to clarify the scope and extent of the obligations of international organizations under customary international law and general principles of international law.

### 5. Draft article 4 — General rule on attribution of conduct to an international organization

81. It was recommended that the Commission clarify whether the term "agent" was intended to include member States of an international organization. In certain circumstances, it was suggested, States could be regarded as agents of organizations of which they were members. Further thought should also be given as to whether there should be a limit to the attribution of responsibility for the conduct of certain organs or agents, such as short-term staff or personnel deployed in peacekeeping operations. The view was also expressed that "organs" should be included in paragraph 2 along with "agents", and that the definition of "rules of the

[6] Ibid., p. 45.

organization" in paragraph 4 should include the rules of procedure and statutes of its organs. According to another view, the definition of "rules of the organization" was considered unsatisfactory since the "established practice" of an organization could not give rise autonomously to an international obligation whose breach would constitute an internationally wrongful act.

### 6. Draft article 5 — Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization

82. It was suggested that the commentary state that, in the case of the international administration of a territory, the responsibility for the conduct of a State organ placed at the disposal of an international organization be attributed to the latter.

### 7. Draft article 8 — Existence of a breach of an international obligation

83. Some delegations supported the present wording of draft article 8. It was recalled that no consensus existed as to the legal status of the internal rules of an organization, and that the precise circumstances in which a breach of such rules gave rise to responsibility had to be decided in each specific case in the light of the type of rule in question. Some delegations were of the view that since paragraph 1 already covered any international obligation regardless of its origin and character, paragraph 2 was unnecessary. It was also observed that the drafting of the two paragraphs tended to further confuse the issue by implying a different legal status for rules of an organization. In this context, it was recommended that the word "also" be deleted from paragraph 2.

84. Some delegations expressed the view that rules of international organizations, even those of an internal nature, could give rise to international responsibility, and constituted a priori rules of international law. It was stated that the draft articles should provide guidance on which rules of an international organization entailed international obligations. There were suggestions that distinctions could be made on the basis of whether: (a) the rules were procedural or administrative in nature; (b) affected third parties; (c) bound, or granted rights to, persons or entities that were subjects of international law; or (d) caused injury to a subject of international law when violated. The principle of *lex specialis* was also considered useful in this regard.

85. Some delegations recommended that special attention be given to the internal rules of the European Union, in particular whether a violation of secondary Community law by an institution of the Community or a member State triggered the international responsibility of the European Community.

### 8. Draft articles 9, 10 and 11 — International obligation in force for an international organization: Extension in time of the breach of an international obligation: Breach consisting of a composite act

86. Support was expressed for draft articles 9, 10 and 11, which corresponded to the respective provisions of the articles on State responsibility. In contrast, the view was expressed that draft article 11 followed the draft articles on State responsibility too closely since particular issues of attribution arose in relation to international organizations.

### 9. Draft articles 12, 13 and 14 — Aid or assistance in the commission of an internationally wrongful act; Direction and control exercised over the commission of an internationally wrongful act; Coercion of a State or another international organization

87. Some delegations supported the modelling, mutatis mutandis, of draft articles 12, 13 and 14 on the corresponding articles on responsibility of States. However, suggestions were also made that draft articles 12, 13 and 14 be modified to indicate explicitly that the term "State" applied to both members and non-members of an international organization, and that they be combined with draft article 15 to avoid overlap.

88. With respect to draft articles 12 and 13, it was questioned (a) whether it should be necessary for the violated obligation to be binding on the international organization for the provision of aid and assistance or direction or control in the commission of an internationally wrongful act to constitute an internationally wrongful act; and (b) what kind of knowledge requirement should apply. In regard to the commentary to draft article 13, it was emphasized that joint direction and control was not the same as direction by one international organization and control by another. Where direction and control were assumed by separate international organizations, it would be preferable to introduce the concept of joint or collective responsibility.

89. Regarding draft articles 13 and 14, it was considered unclear whether a binding decision by an international organization could be regarded as a form of direction, control or coercion. In this context, concern was expressed that the organization could incur responsibility either directly, by taking the decision, or indirectly, by means of the direction, control or coercion implied by the decision. A view was expressed that a binding decision of an international organization could give rise to coercion, but only in exceptional circumstances. Conversely, the point was made that the provision on coercion should apply primarily to third States.

### 10. Draft article 15 — Decisions, recommendations and authorizations addressed to member States and international organizations

90. Some delegations welcomed draft article 15, and expressed support for its current formulation. However, there were also suggestions that: (a) the scope of the provision be clarified; (b) the text indicate that it was intended to prevent the circumvention of international obligations and that the title be changed accordingly; and (c) draft articles 12 to 15 be combined into a single provision.

91. The Commission was requested to clarify the allocation of responsibility between an international organization and its member States for an act undertaken on behalf of the organization. In the event of overlapping responsibility, it would be for the relevant court to decide the relevant weight of (a) the actual act and (b) the underlying authorization or recommendation. The view was also expressed that allocation of responsibility ought to be analysed in the light of the content, nature and circumstances of the act committed by the member State and of the rules of the organization concerned. It was further suggested that the Commission make reference to the particularities of international integration organizations, such as the rule that, when implementing a binding act of the European Community, State authorities would act as organs of the European Community.

92. Support was expressed for the notion that an international organization should incur international responsibility for acts committed by member States on the basis of a binding decision, authorization or recommendation of the international organization that would be internationally wrongful if committed by the organization. It was noted, however, that binding decisions, authorizations or recommendations by an international organization could substantively affect the underlying legal obligations of States; its responsibility towards members and non-members might therefore be different. Support was specifically expressed for the use of the word "circumvent" to encompass a wider array of possibilities than the word "breach". However, some delegations expressed concern over the requirement that the conduct "circumvent" an obligation of the organization; the scope of the provision, the requirements for showing circumvention, and the precise meaning of the term "circumvent" were considered unclear. It was noted that the criterion had not been included in the draft article as proposed by the Special Rapporteur, changed the consequences of the obligation breached and altered the relationship with other draft articles in that section. In addition, the criterion was considered unnecessary in the light of paragraph (4) of the commentary.

93. It was suggested that draft article 15 be amended to refer simply to a "member" or to a "member of the organization", since the term "other entities" in draft article 2 broadened the possible membership of an international organization beyond States and other international organizations.

94. As regards paragraphs 1 and 2, some delegations welcomed the distinction made by the Commission between legally binding decisions by an international organization and authorizations or recommendations in the respective paragraphs. Other delegations questioned whether such a distinction was necessary, since it seemed to relate more to the level of responsibility of member States. Clarification was requested as to whether States bore the same responsibility under draft article 15, paragraph 1, as under paragraph 2. It was also noted that the distinction could be further refined on the basis of the practice of the European Community.

95. With regard to paragraph 1, some delegations questioned the omission of the requirement that the wrongful act actually be committed. Other delegations observed that, if the mere adoption of a law constituted a breach of international law under general international law, the notion of circumvention might be superfluous in paragraph 1, and that "circumvent" could be replaced with the word "breach".

96. With regard to paragraph 2, some delegations expressed concern regarding its basic premise, that international organizations should incur international responsibility for authorizations and recommendations because they could be implemented in a variety of ways, or not at all. In addition, it was noted that no parallel provision existed in the articles on State responsibility, covering incitement. Moreover, the point was made that the diversity of practice of international organizations made devising a uniform rule in this respect difficult, but should nonetheless be reflected. Other delegations expressed concern about the drafting of paragraph 2 and suggested improvements. It was noted that the requirement of reliance on the authorization or recommendation was vague and weak; would be difficult to apply in practice; and could be replaced with an expression such as "in compliance with" or "in conformity with". In the view of some delegations, responsibility should be incurred regardless of whether the act was, in fact, committed, although it might affect the nature of the resulting responsibility. Some

delegations questioned the necessity of distinguishing between authorizations and recommendations, and suggested the use of the more general term "non-binding decision" instead of "authorization or recommendation". Another view was that the two concepts should be further distinguished since a recommendation was not binding, while an authorization provided the authority without which a member could not act.

97. With regard to paragraph 3, some delegations welcomed its current formulation, while other delegations noted with concern that the provision would render it unlawful to direct, authorize or recommend that a State take an action that was in fact lawful for that State to undertake. The practice or policy considerations on which such a principle would be based were unclear. It was suggested that paragraph 3 be reformulated in order to draw a distinction depending on the scope of freedom of action of the States concerned; to distinguish between member States and third States; and to clarify its relationship to draft article 16.

98. Some delegations expressed the view that responsibility should also be incurred when an international organization directed, authorized or recommended a State or other international organization take an action in violation of an obligation of the latter entity but not of the former international organization. The existence of a lacuna in this regard was demonstrated by the recent decision of the European Court of Human Rights in the case *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*.

### 11. Draft article 16 — Effect of this chapter

99. Support was expressed for the Commission's view that the wording could be construed in a more general manner to mean that the responsibility of other international organizations and States was governed by distinct rules of international law.

### 12. Question (a) — Aid or assistance, direction and control, or coercion by a State to an international organization in the commission of an internationally wrongful act

100. Some delegations expressed support for formulating provisions covering the responsibility of a State for aiding or assisting, directing and controlling, or coercing an international organization to commit an internationally wrongful act. In this connection, it was noted that such responsibility had been deliberately excluded from the articles on responsibility of States, thereby leaving a substantial lacuna in the codification of international law. It was suggested that wherever appropriate, the draft provision should closely follow the principles laid down in articles 16, 17 and 18[7] of the articles on responsibility of States for internationally wrongful acts.

101. It was observed that international responsibility could be incurred by providing an international organization with aid or assistance in breaching an obligation which was also opposable to the State concerned, or by coercing an international organization to commit a wrongful act, directing other States to do so or exercising control over them in the commission of a wrongful act under the auspices of an international organization. The view was expressed that a State providing aid or assistance is responsible only if it is aware of the circumstances making the conduct

[7] Ibid., p. 47.

of the assisted State internationally wrongful; if the aid or assistance is given with a view to facilitating the commission of that act, and actually does so; and if the completed act is such that it would have been wrongful had it been committed by the assisting State itself. Concern was also expressed that an organization might use certain member States to implement a wrongful policy and to distribute responsibility for it among all their members; recognition of such responsibility would make States and international organizations more accountable. It was also questioned whether it was appropriate to limit a State's responsibility in situations of aid or assistance only to cases in which the act would be internationally wrongful if committed by that State, even though it might be necessary to ensure that such a principle did not provide States with a pretext to avoid implementing properly adopted and lawful decisions of an international organization.

102. It was considered important to take into account whether the State had the freedom to choose to participate or not in the commission or authorization of the act by the international organization. The concept of joint or additional (subsidiary) responsibility, which should be both political and material in nature, might be useful in determining the responsibility of States for certain actions of international organizations. In certain situations, it would be appropriate to absolve international organizations of responsibility for internationally wrongful acts and to provide instead for the collective responsibility of member States, particularly with regard to international organizations with limited resources and a small membership, where each member State had a high level of control over the organization's activities.

103. Some other delegations opposed the inclusion of provisions relating to the responsibility of States for the internationally wrongful acts of international organizations in the draft articles. The view was expressed that such provisions would raise questions relating to State responsibility rather than to the responsibility of international organizations; instead, a reference to the issue could be made in the commentary. Moreover, some delegations indicated that, there seemed to be little difference between the responsibility of States for the acts of international organizations and for the acts of other States. Accordingly, suggestions were made to include (a) a saving clause accompanied by a commentary; or (b) a reference clause that would ensure the application, mutatis mutandis, of the rules already established under the articles on Responsibility of States for Internationally Wrongful Acts.

### 13. Question (b) — Other cases in which a State could be held responsible for the internationally wrongful act of an international organization of which it is a member

104. With regard to the second question by the Commission, some delegations indicated that there were situations in which States should bear responsibility for the internationally wrongful acts committed by international organizations of which they were members, in particular when those member States voted in favour of a decision or implemented a decision, recommendation or authorization constituting the internationally wrongful act. However, the Commission was urged to take a cautious approach to the question of the responsibility of member States for the acts of international organizations. It was recommended that it be made clear that such responsibility would arise only in certain exceptional cases, since international organizations possessed distinct international legal personality.

105. In this regard, it was noted that the case law of the European Court of Human Rights and the International Court of Justice indicated that member States were responsible for the acts of international organizations, even after they had transferred competence to those organizations. Furthermore, the *International Tin Council* case and the *Westland Helicopters* case suggested international responsibility was incurred by member States for their negligent supervision of organizations. According to another view, the domestic judicial decisions rendered in these cases did not reveal a unified attitude under international law and instead focused on the responsibility of member States under domestic law. Nonetheless, it was suggested that a unified legal solution should be developed so as to avoid "forum shopping" under domestic law, which would lead inevitably to inconsistent national judgements. Two types of measures were therefore proposed: (1) ex poste ante measures, such as informing potential injured third parties of the scope of responsibility of member States regarding specific acts of concerned international organizations, and (2) ex post facto measures, such as establishing an international fund to address unforeseen situations.

106. With regard to other circumstances in which a State might bear responsibility for the internationally wrongful act of an international organization, two hypothetical cases were delineated: (1) activities conducted jointly by an international organization and one or more member States resulting in the violation of international obligations binding on both the organization and its members and (2) failure by the member States to exercise due diligence with regard to the activities of the organization.

## D. Diplomatic protection

### 1. General remarks

107. The Commission was again congratulated on the completion of the first reading of the draft articles on diplomatic protection at its fifty-sixth session, in 2004, and was encouraged to complete the second reading at its fifty-eighth session, in 2006.

108. Most delegations expressed their general satisfaction with the overall thrust of the draft articles, which were described as constituting a sound product with a reasonable mix of codification and sensible progressive development. A preference was expressed for limiting the scope of the project to the codification of customary international law, departing from or supplementing it only to the extent warranted by sound public policy considerations supported by a broad consensus of States.

109. Others called on the Commission to undertake a thorough examination of the draft articles adopted on first reading. A preference was expressed for also dealing with the question of the consequences of diplomatic protection: the question whether a State was under an obligation to pay over to an injured individual money that it had received by way of compensation for a claim based on diplomatic protection was fundamental.

110. The delegations concurred with the premise that States had a right rather than a duty to exercise diplomatic protection. It was also emphasized that diplomatic protection should be exercised solely by peaceful means in compliance with international law. The view was expressed that it was incumbent on the State to

seriously consider whether to grant diplomatic protection to its nationals in the event of the alleged existence of wrongful acts against them carried out by another State, before deciding to exercise protection.

### 2. The doctrine of "clean hands"

111. General agreement was expressed with the Commission's decision, on the recommendation of the Special Rapporteur, not to include the doctrine of "clean hands" in the draft articles. The view was expressed that the doctrine was not sufficiently anchored in general international law, in terms of State practice, to be considered an established customary rule, and that it was, likewise, questionable whether the doctrine would fall within the purview of diplomatic protection since it had been shown that the doctrine had chiefly been raised in claims between States for direct injury, nor could its inclusion be justified as an exercise in the progressive development of international law. The view was also expressed that the doctrine could be inconsistent with *jus cogens* norms of international law set forth in the Vienna Convention on Consular Relations,[8] and that its application in relation to the admissibility of diplomatic protection would weaken the universal application of human rights protection. Agreement was further expressed with the Special Rapporteur's view that the doctrine should more appropriately be raised at the merits stage, since it related to attenuation or exoneration of responsibility rather than to admissibility.

### 3. Comments on specific draft articles

#### (a) Draft article 1. Definition and scope

112. A view was expressed that the words "its national" were too restrictive, since the scope of the draft article was widened in later articles, such as draft article 8 on stateless persons and refugees.

#### (b) Draft article 3. Protection by the State of nationality

113. A suggestion was made to reformulate paragraph 1 in the following way in order to place greater emphasis on the individual: "The State of nationality is the State entitled to exercise diplomatic protection."

#### (c) Draft article 5. Continuous nationality

114. As regards paragraph 1, a view was expressed that, in practice, it could be very difficult to establish the exact time of the resolution of a dispute for purposes of the continuous nationality requirement. Support was thus expressed for the Commission's approach of fixing the end date at that of the official presentation of the claim.

115. As regards paragraph 3, it was suggested that the phrase "Diplomatic protection shall not be exercised" should be replaced by "Diplomatic protection may not be exercised", since that wording was more in keeping with the discretionary authority of the State with respect to the exercise of diplomatic protection, and with the terminology used in draft articles 7 and 14.

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[8] United Nations, *Treaty Series*, vol. 596, p. 261.

**(d) Draft article 7. Multiple nationality and claim against a State of nationality**

116. Support was expressed for the Commission's approach in draft article 7, which was considered a codification of existing customary international law and as being in step with contemporary reality. It was observed further that the rule in that article had no bearing on the possibility of providing consular assistance, which was not governed by the law pertaining to diplomatic protection.

**(e) Draft article 8. Stateless persons and refugees**

117. Several delegations welcomed the inclusion of a provision on the diplomatic protection of stateless persons and refugees in certain cases. It was considered important to be able to offer diplomatic protection to such vulnerable categories of persons.

118. Some support was further expressed for the commentary to draft article 8 establishing that the term "refugee" was not necessarily restricted to persons falling within the definition contained in the 1951 Convention on the Status of Refugees[9] and its Protocol. The view was expressed that paragraph 2 of the commentary was of particular importance, since protection by the State of residence was crucial for persons who could not or did not want to avail themselves of the protection of the State of nationality, or risked losing refugee status in the State of residence if they did so.

119. The view was also expressed that the requirement that the stateless person or refugee must have lawful and habitual residence in the State exercising diplomatic protection at the time of the injury and at the date of the official presentation of the claim, in order to qualify for diplomatic protection, was too onerous, since in many cases where effective diplomatic protection was needed, the injury would have taken place prior to the entry of the person concerned into the territory of the State exercising diplomatic protection. It was also suggested that the phrase "lawfully and habitually resident" be replaced by "lawfully staying", as per article 28 of the 1951 Convention on the Status of Refugees.

**(f) Draft article 9. State of nationality of a corporation**

120. The suggestion was made that the provisions on diplomatic protection for legal persons such as corporations could gain from a fresh look at comparative corporate law and contemporary global economic developments. For example, it was noted that draft article 9 ruled out the possibility of dual nationality for corporations, although such corporations existed in certain countries.

**(g) Draft article 11. Protection of shareholders**

121. Satisfaction was expressed with the fact that the Commission had ensured overall consistency with the case law of the International Court of Justice, on the basis of the *Barcelona Traction* case.[10]

[9] United Nations, *Treaty Series*, vol. 189, p. 137.

[10] *Barcelona Traction, Light and Power Company, Limited, Second Phase, 1970, I.C.J. Reports*, 1970, p. 3.

### (h) Draft article 14. Exhaustion of local remedies

122. It was suggested that the following passage be added in the commentary to article 14: "No prior exhaustion of local remedies is required for diplomatic action stopping short of bringing an international claim. See Restatement (Third) of the Foreign Relations Law of the United States (1987), paragraph 703, comment d: 'The individual's failure to exhaust domestic remedies is not an obstacle to informal intercession by a state on behalf of an individual.'" In terms of a further suggestion, no distinction should be made between legal and factual denial.

### (i) Draft article 16. Exceptions to the local remedies rule

123. A view was expressed that paragraphs (a), (b) and (c) negated draft articles 14 and 15, since the wording was open to different interpretation. It was observed that, in formulating the exceptions to the exhaustion of local remedies rule, the Commission should seek to prevent such disparate interpretations leading to the improper application of that rule.

### (j) Draft article 17. Actions or procedure other than diplomatic protection

124. The view was expressed that the article should be interpreted as referring not to coercive measures, such as the imposition of protection by means of force or the application of mandatory penalties or selective measures, but rather to actions or procedures regulated by bilateral, regional or international treaties. It was also reiterated that the principles and rules of diplomatic protection were without prejudice to the law of consular protection and other applicable rules of international law, including those pertaining to the law of the sea. It was proposed that the commentary explicitly indicate that consular assistance had been excluded from the draft articles.

125. It was suggested that the phrase "under international law" be deleted and the draft article be reformulated to read: "The right of States, natural persons or other entities to resort to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act are not affected by the present draft articles."

### (k) Draft article 19. Ships' crews

126. Support was expressed for draft article 19, which was considered a solution that ensured that important protective measures established by the law of the sea were not undermined.

### 4. Final form of the draft articles

127. Several delegations expressed a preference for the eventual adoption of the draft articles on diplomatic protection in the form of an international convention.

## E. Expulsion of aliens

### 1. General comments

128. Delegations welcomed the inclusion of the topic in the work of the Commission. The latter was encouraged to complete its work on this topic in a

timely manner and to make further progress at its fifty-eighth session. Referring to the Commission's invitation to States to supply information concerning their practice in relation to the topic, clarification was requested about the approach of the Commission and the issues that would be addressed.

129. However, some delegations expressed doubts as to the appropriateness of this topic being considered by the Commission or drawing up a comprehensive legal regime on this topic. A view was expressed that there was no evidence that the topic deserved autonomous treatment and was suitable for codification and progressive development. According to another view, this topic should have been taken up by other bodies within the United Nations system, such as the Office of the United Nations High Commissioner for Refugees or the Commission on Human Rights.

130. As regards the approach to the topic, the importance of undertaking a careful study not only on international law, but also on national legislation and case-law was stressed by several delegations, with some of them looking forward to an analytical compilation to be prepared by the Secretariat. In this respect, the hope was expressed that the Commission would pay equal attention to developed and developing countries. Mention was also made of the need for the Commission to take into account the factual problems arising from the expulsion of aliens as well as the effects of such measures.

131. Different views were expressed as to the final outcome of the work of the Commission on this topic. While some delegations remained open in this respect, other delegations favoured the elaboration of draft articles. It was also suggested that the outcome could take the form of a repertory of practice or a political declaration. It was observed that the Special Rapporteur seemed to favour the elaboration of rules focusing on individual expulsions that would supplement those set out in article 13 of the International Covenant on Civil and Political Rights; therefore, a text produced by the Commission could serve as the basis for an additional protocol to the Covenant. If that were the intention, it would be useful for the Commission to collaborate with bodies that had specific competence in the field of human rights, such as the Human Rights Committee. Moreover, it was emphasized that the outcome of the work of the Commission on this topic should fill in the gaps in existing rules and regulations and should not be at odds with existing international instruments.

### 2. Scope of the topic

132. Delegations stressed the importance of a proper delimitation of the scope of the topic. Concerning the categories of aliens to be covered, some delegations were of the view that the topic should cover the removal of aliens legally and illegally present in the territory of the State. The inclusion of stateless persons was also favoured, while different views were expressed as to the inclusion of refugees and migrant workers. It was suggested that the status of internally displaced persons, as well as the expulsion of a State's own nationals and the situation of people in transit were outside the scope of the topic. Furthermore, a view was expressed in favour of the exclusion of issues relating to diplomatic personnel.

133. As for the measures to be covered, it was observed that issues such as the transfer of aliens for law enforcement purposes and extradition were outside the scope of the topic. The view was expressed that questions relating to denial of admission (including the situation of aliens on a boat who had entered the territorial

waters of a State) and immigration law in general should be excluded. However, it was also suggested to consider under the notion of expulsion the refusal of entry to an alien returning to his country of residence, in which he had established social and economic relations, or to an immigrant on board a vessel or plane under the control of the expelling State. A view was also expressed that preventive measures (*éloignement*) and the admission of expelled aliens might be examined by the Commission.

134. It was suggested that the work of the Commission on this topic should exclude issues such as refugee status, *refoulement*, decolonization, self-determination and population movements. However, it was also suggested that the relationship of the topic with human rights regimes and other fields of international law be considered, in particular by reflecting the provisions of existing conventions dealing with refugees and migrant workers. Attention was drawn to the principle of *lex specialis*, in particular with respect to provisions relating to the repatriation of migrants who had been subject to illicit trafficking, to the return of persons seeking refuge or asylum and to expulsions in time of armed conflict. It was further suggested that the future draft articles should include a provision allowing for the application of treaties providing additional protection to the persons concerned.

135. Some delegations were of the view that questions relating to international humanitarian law, such as expulsions in time of armed conflict and, in particular, expulsions from occupied territories should not be covered. The point was also made that those "expelled" from occupied territories were not "aliens" and that such territories were not "part" of the occupying State. However, it was suggested that mass expulsions occurring in situations of armed conflict might be covered.

136. A proposal was made to include within the topic subjects such as a change in citizens' status due to a change in status of the territory in which they were residing. In contrast, it was suggested that the large-scale expulsion of a population as the result of a territorial dispute not be covered owing to the political nature of the issues involved.

137. Doubts were raised as to the appropriateness of dealing with diplomatic protection or State responsibility in the context of this topic. However, a view was expressed that all the consequences of expulsion in terms of the responsibility of the expelling State ought to be examined. According to another view, the Commission should deal with the legal consequences of expulsion, so long as duplication was avoided with its work on other topics. It was also suggested that the Commission decide at a further stage whether to elaborate on the consequences of an unlawful expulsion.

138. A view was expressed that the Commission should take into account the duty of States of origin to accept the return of their nationals and of stateless persons who had been deprived of their nationality prior to obtaining a new nationality in a manner contrary to international law.

139. Furthermore, the question was raised as to whether a single study should deal with both individual and collective expulsions.

### 3. Use of terms

140. A preference was expressed for the use of the term "alien" rather than "foreign national" in order to cover stateless persons. There was also support for including

within the term "alien" various categories of individuals such as stateless persons, political refugees, asylum-seekers and migrant workers. Concerning the notion of "expulsion", support was expressed for the approach of the Special Rapporteur to include actions other than official acts of States. Moreover, it was suggested that the term "expulsion" be used in relation to the removal of aliens who were physically present in the territory of the State, whether lawfully or not.

### 4. The right to expel and the obligation to respect human rights

141. The general approach taken by the Special Rapporteur, based on the need to reconcile the right of States to expel aliens and respect for human rights, was widely supported by the delegations, with some of them pointing out that this would also apply to the fight against international terrorism. The view was also expressed that a fair balance must be struck between the rights of the individual and the interest of the expelling State in pursuing legitimate aims such as the protection of public order.

142. Several delegations emphasized the need to respect human dignity and fundamental human rights when expelling an alien. Specific references were made to the right to fair treatment and to the prohibition of torture and unnecessary violence. It was also stressed that an alien must not be expelled to any State where his or her life would be in danger or where he or she would be subjected to torture, cruel or inhumane or other degrading treatment or punishment. The case-law of the European Court of Human Rights concerning the lawfulness of an expulsion from the perspective of its impact on family and private life was also mentioned. Furthermore, the point was made that measures should be taken to protect the property rights of the aliens expelled.

### 5. Grounds for the expulsion of an alien

143. A view was expressed that the Commission should prepare draft articles focusing on the reasons that may justify the expulsion of an alien. The point was made that any expulsion should be based on legitimate grounds, as defined in domestic law, which must not be contrary to international law. Grounds relating to the preservation of public order or national security, as well as grounds based on the violation of immigration law, were considered by delegations as admissible under international law. In contrast, the view was expressed that expulsions based on discriminatory grounds such as religious belief, ideology, race, national or ethnic origin, or sexual orientation or behaviour, should be inadmissible. Reference was also made to the principle of proportionality in relation to the lawful grounds for an expulsion.

### 6. Procedural guarantees

144. Among the procedural guarantees mentioned by the delegations were: (1) respect for the rule of law; (2) the requirement that the grounds be stated in the expulsion order; (3) the need to provide fair procedures in the event of an expulsion; (4) the right to a review procedure; and (5) a reasonable period of time to prepare for departure. Specific references were made to the relevant provisions of the following international instruments: article 13 of the International Covenant on Civil and Political Rights, article 1 of Protocol No. 7 to the European Convention on Human Rights, and article 8 of the American Convention on Human Rights.

Attention was also drawn to the case-law of the European Court of Human Rights according to which States may not mislead aliens, even those who are illegally present in their territory, in order to deprive them of their liberty with a view to expelling them.

### 7. Detention pending deportation

145. The view was expressed that detention should be avoided, save when an alien subject to an expulsion order refused to leave the country or tried to elude the control of State authorities. Mention was also made of the prohibition of arbitrary detention.

### 8. Specific categories of aliens

146. Some delegations stressed the need to distinguish between aliens who were legally present in the territory of a State and aliens who had entered illegally or whose presence had become illegal. It was also suggested that restrictions could concern only the methods of expulsion in the case of illegal aliens.

147. The view was expressed that the status of long-term residents as well as aliens who had lost all or most of their interests in their State of origin or had acquired special interests in the expelling State needed a thorough examination. It was also noted that clarification was needed as to whether long-term residents enjoyed special protection with respect to the possible grounds justifying their expulsion. Specific reference was made in this context to the *Ahmadou Sadio Diallo* case (Republic of Guinea v. Democratic Republic of the Congo), pending before the International Court of Justice.

### 9. The position of other States

148. A view was expressed that the decision by a State to expel an alien, as a unilateral act of that State, should not be regarded as imposing any obligation on any other State, including the State of nationality; that did not mean, however, that the matter could not be settled or managed by mutual agreement. It was also suggested that an expulsion should be carried out only after due consultation and exchange of information with the home country of the individual expelled.

149. Concerning the status of transit States, it was remarked that a transit State had no obligation to readmit expelled aliens or to undertake similar commitments.

### 10. Collective or mass expulsion

150. Some delegations were of the opinion that collective or mass expulsions were contrary to international law, namely because of their discriminatory character and their incompatibility with human rights, in particular with treaty guarantees such as those contained in Protocol No. 4 to the European Convention on Human Rights and in article 13 of the International Covenant on Civil and Political Rights. It was remarked that the question of whether the expulsion of all persons aboard a vessel or in a vehicle constituted collective expulsion would depend on a combination of many factors.

151. It was suggested that the Commission should clearly indicate that mass or collective expulsions were prohibited. However, a view was expressed that the

prohibition of collective expulsion did not cover the case of bilateral agreements for the return of aliens who had entered a country unlawfully.

152. It was also suggested that the Commission could draft a rule according to which, while an expulsion might involve a group of people sharing similar characteristics, the decision to expel should be taken at the level of the individual and not of the group.

## F. Unilateral acts of States

### 1. General comments

153. Several delegations welcomed the eighth report of the Special Rapporteur (A/CN.4/557) and the approach taken therein; the case studies were useful in deepening understanding of the topic (see statement by Japan, A/C.6/60/SR.14, para. 52) and in illustrating the range of the content, the form, the author, the addressee of, and third party reactions to, unilateral acts of States, as well as legal effects that such acts were capable of producing. Some delegations acknowledged that the work already carried out by the Commission on the topic was useful. It confirmed the existence of unilateral acts which produced legal obligations and revealed the difficulty of determining any general rules that could be applied, in particular regarding the persons authorized to formulate them, the time when they came into force and their modification or termination.

154. Several delegations were nevertheless mindful of the tendency of the debate on the topic to be circumvoluted; with little progress despite nine years of consideration. This was largely attributed to the diversity of practice, making it difficult to formulate a meaningful definition of a unilateral act and to distinguish it from non-binding political statements frequently made by States.

155. Some other delegations reiterated their misgivings regarding the feasibility of codification of the topic and called upon others to carefully consider the chances of a successful outcome in the near future. The topic posed particular challenges on a number of fundamental issues, such as what qualified as unilateral acts and how such acts should be classified and analysed, which called into question whether the topic was worthy of further study or amenable to codification or progressive development. First, the evident important role played by addressees of unilateral statements, the significance of their reactions and of third parties were considerations which underscored the central role to the topic of the specific context in which a unilateral act occurs more than the unilateral act itself. Second, the subjective nature of intention, namely whether a State manifestly intended to enter into a legal commitment, was another crucial aspect essential to the topic, which made codification or progressive development neither appropriate nor feasible.

156. To some delegations, the topic was susceptible of codification and progressive development and they urged that further progress be made notwithstanding its complexity, as well as doubts as to the feasibility of its codification. The proliferation of unilateral acts of States and their legal effects had a major impact on international relations. A review of the various case studies and an elaboration of an applicable regime would assist in determining the conditions under which such acts produced legal effects, thereby enhancing certainty, stability and predictability in international relations. The case law of the Permanent Court of International Justice

and the International Court of Justice offered a rich source of examples of State practice.

### 2. Consideration of issues concerning the scope of the topic

157. Some delegations noted that the Commission had not yet managed to determine the scope and limits of the topic; asserting that unilateral acts could have legal effects was not enough; agreement should be reached on the legal category to which such acts belonged, in particular whether they constituted an autonomous source of law or were a component of other sources, such as custom, treaty, or general principles. A viewpoint regarded unilateral acts of States to be one of the sources of international obligations.

158. Some other delegations noted that the topic was overly broad and the attempts should be made to limit it to core issues, namely acts which created obligations for the author State; the obligation a State could assume through a unilateral declaration, the conditions governing its validity and its effects on third States, including the corresponding rights of those States. Indeed, some delegations stressed the study of unilateral acts *stricto sensu*, saving the study of unilateral conduct of States which might produce legal effects for a later stage.

159. Some other delegations considered it vital to have a clear definition of unilateral acts of States to distinguish such acts from acts creating political obligations. Such a definition should reflect an intention to create a legally binding obligation and should be sufficiently narrow to preserve the freedom of States to make political statements without legal consequences. On one account, a unilateral act could be defined as a unilateral statement by a State, formulated by a person competent to represent and commit the State at the international level, by which that State expressed its will to create obligations or produce other legal effects under international law. With regard to form, both written and oral statements could entail legal obligations.

160. Some delegations noted it would be counterproductive to concentrate on elaborating a single definition of unilateral acts. Such acts were too varied in their legal nature and in the ways in which they were performed. It also noted that it would not be appropriate to produce definitions and rules comparable to the regime established by the Vienna Convention on the Law of Treaties. Indeed, the point was made that any suggestion that the law of treaties could generally be transposed to unilateral acts should be considered with caution, particularly with respect to the formulation, effects or revocation of such acts.

161. On whether a statement created legal obligations or was merely political in nature, some delegations observed that the intention of the author State was an important determining factor, alongside purpose, context, circumstances, content and form. On the other hand, it was countenanced that ambiguities inherent in certain types of unilateral acts often made it difficult to distinguish a political act from a legal act. Unilateral acts were usually a means to achieve political ends. Accordingly, their legal effects may not necessarily reflect their true nature or the will of the State.

162. It was also suggested that it would be vital to identify and define unilateral acts of States which were at odds with international law and the principles of the Charter of the United Nations and which, in fact, had adverse legal consequences

for both the State performing such acts and other States. On this view, unilateral coercive measures which were extraterritorial in nature should fall within the purview of study by the Commission.

### 3. Specific issues on which the Commission had requested comments and observations of States

163. Some delegations considered that the revocability and modification of unilateral acts depended on the form, the content, the author and the addressees of the act, and must be determined by examining each category or type of unilateral act. Several delegations attached significance to the principle of good faith, as it governed the creation and performance of legal obligations. In order to protect the rights of addressees and preserve international legal stability, it was suggested that it should not be permissible for States to revoke or modify unilateral acts without the consent of the other States concerned or of other subjects of international law.

164. It was also stated that the principle of *rebus sic stantibus* could be considered as ground for the revocability and modification of unilateral acts, noting that the Vienna Convention on the Law of Treaties provided a cogent precedent and framework.

### 4. Future work on the topic

165. Considering that the topic had been on the Commission's programme of work since 1996, the suggestion was made that the Commission should now focus on determining the final form that discussions on the topic would take. Some delegations noted that it was too early for the Commission to elaborate draft articles on the topic; it should continue its review of existing State practice and, on that basis, prepare a framework and possible principles or guidelines. Some other delegations suggested that the Commission could examine the draft articles already submitted to the Drafting Committee. It was also noted that the Commission should continue to focus on draft articles for a legally binding instrument while keeping open the option of guidelines or principles.

166. Some delegations noted that the deliberations of the Working Group of the Commission on the topic had offered some interesting ideas, and its preliminary conclusions would provide a basis for substantial progress during the Commission's next quinquennium. Some other delegations encouraged the Commission to conclude its work or submit its preliminary conclusions in 2006 on the basis of the case studies.

167. In the formulation of such conclusions, it was suggested that the following elements could be incorporated: (a) international law attributed legal effects to certain lawful acts of States without the need for an act or omission of another subject of international law; (b) a unilateral act was not necessarily an express act, nor did it necessarily consist of a single act or omission, but might rather consist of a series of concordant and related acts or omissions; (c) the form of a unilateral act was not legally relevant; it could be written or unwritten; (d) the legal effects of the unilateral act could be the renunciation or affirmation of a right of the subject performing the act, the acceptance of an international obligation by the State that was the author of the act or the attribution of a right to a third State, but not the creation of an obligation for a third State; and (e) the State should, in accordance

with the principle of good faith, not perform contradictory acts or acts incompatible with its own unilateral acts.

168. Some other delegations suggested a methodology that would formulate pointers to assist in the ascertainment of the existence of a unilateral obligation of a State. Such indications would establish only a presumption of the existence of a unilateral obligation, which the author State would have the onus of proving. The pointers could be grouped according to primary and secondary criteria taking into account (a) the persons or organs authorized to enter into unilateral obligations on behalf of a State; and (b) the context and circumstances in which the corresponding actions had been taken.

## G. Reservations to treaties

### 1. General comments

169. Several delegations commended the Special Rapporteur for his treatment of the question of the validity of reservations, the definition of the object and purpose of a treaty and reservations to a provision articulating a customary rule.

170. It was stated that with respect to the process of objecting to reservations, the paucity of resources in many States did not allow consideration of the many reservations formulated by others. There might also be policy reasons for not reacting to reservations. In view of these practical and policy problems, it was not clear what significance should be attached to a failure to object to a reservation. silence on the part of States could not be transformed into an implicit system of validation of reservations. In certain European institutions, it had been found helpful for Member States to consider reservations collectively.

171. With respect to the term "Specified reservations", some delegations expressed doubts about the attempt to define it, since it was not certain that the definition offered had captured all the circumstances in which reservations could be specified within the meaning of article 19 (b) of the Vienna Conventions.

172. The point was made that the importance of the terminological issue of the use of "validity" versus "permissibility" might have been overstated, the answer might become clear once the overall structure of that part of the draft guidelines was completed. Many delegations expressed their preference for the use of the term "validity" as a more neutral term. Other delegations expressed their preference for the term "opposability", as being more neutral or even the term "admissibility".

173. According to one point of view, the question of qualification of reservations as valid or invalid should not be taken until the legal effects of reservations had been discussed. The only distinction that should be made at present was the one between the position that reservations were intrinsically prohibited by a treaty because they were incompatible with its object and purpose and the position that the effect of reservations depended only on the reactions of other States. Emphasis should be placed on the scope of a reservation's effects rather than on the qualification issue, which seemed academic.

174. The view was also expressed that it might be more pragmatic to leave the terms in brackets for the time being and return to them after considering all the possible effects of reservations.

175. Several delegations supported the idea of holding a seminar on the subject of reservations to human rights treaties and trusted that the Committee on the Elimination of Discrimination against Women would be invited to participate.

176. It was observed that the Commission should also consider developing a procedure which could be applied to objections to late reservations or modifications of reservations on the basis of articles 39 to 41 of the 1969 Vienna Conventions. The absence of objections to such kinds of reservations on the prescribed 12-month period should again not be interpreted as the tacit consent of States parties.

177. It was also pointed out that it was essential that treaties should include clear dispute settlement provisions and, where appropriate, establish a monitoring or depositary body to determine the validity of the reservation.

178. It was also suggested that the relationship between reservation, on the one hand, and customary, peremptory and non-derivable norms, which were extremely complex concepts, needed further exploration.

### 2. Comments on draft guidelines

#### (a) 1.1.6 (Statements purporting to discharge an obligation by equivalent means)

179. Concern was expressed about this draft guideline concerning its application to treaties not permitting reservations. It was suggested that the main criterion should be whether or not the legal effect of the obligation was modified.

#### (b) 1.4.5 (Statements concerning modalities of implementation of a treaty at the internal level)

180. It was pointed out that, in many cases, statements concerning modalities of implementation of a treaty at the internal level clarified the scope attributed by a State to the provisions of a treaty and constituted an interpretative declaration.

#### (c) 2.1.4/2.5.5 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations/Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations)

181. These guidelines should be completed by providing for the exceptional situation in which a violation was manifest and concerned a rule of the State's internal law that was of fundamental importance.

#### (d) 2.2.1/2.2.3 (Formal confirmation of reservations formulated when signing a treaty/Reservations formulated upon signature when a treaty expressly so provides)

182. It was stated that these draft guidelines might be inconsistent with article 19 of the Vienna Convention on the Law of Treaties which allowed States to formulate reservations at the time of signature without any additional requirement.

**(e) Draft guidelines 2.6.1/2.6.2 (Definition of objections to reservations/Definition of objections to the late formulation or widening of the scope of a reservation)**

183. Some delegations expressed doubts whether these draft guidelines would dispel the uncertainty left by the Vienna Convention on the Law of Treaties as to whether the provisions on objections in articles 20 and 21 of the Vienna Convention also applied to the provisions of article 19 on reservations that were not admissible. An objection could produce at least two kinds of effects: either the objecting party would declare that the reservation was prohibited under article 19 or the objection would produce the effects envisaged in articles 20 and 21. In order to avoid confusion, it would be better to call "rejection" an objection to the admissibility of reservations under article 19 while the term "objection" should be reserved for the second type of reactions. Two different sub-guidelines should deal with these types of "objections". Moreover, a third category of reactions consisted of a declaration by one party to a treaty stating that it had doubts regarding the admissibility of a reservation owing to the lack of clarity of the reservations.

184. According to another point of view, it would be preferable not to include a definition of "objection" in the guidelines. It was also stated that this idea of the objection preventing the reservation from exerting its legal effects could be included in the definition.

185. It was also stated that this draft guideline might better be considered in the future together with the consideration of effects of objections.

**(f) 3.1 (Freedom to formulate reservations)**

186. Some delegations felt that the word "freedom" in the title was not apt in the context of the reservations regime of the Vienna Conventions. It was observed that the title did not accurately reflect its content. It was also stated that the word "freedom" in the title should be replaced by the word "right". According to another view, the title should be changed to "Formulation of Reservations" in order to conform to article 19 of the Vienna Convention on the Law of Treaties. Others had doubts about the presumption of validity of reservations, since there must be a balance between the need to facilitate participation in a treaty and the need to maintain the unity of the treaty. Any suggestion that special rules or reservations might apply to treaties in different fields, such as human rights would not be helpful.

187. It was observed that implicit prohibition of reservations should also be included in the draft guideline, at least with regard to cases in which the treaty contained a clause authorizing only specified reservations which would have the effect of prohibiting all other reservations.

**(g) 3.1.2/3.1.4 (Definition of specified reservations/Non-specified reservations authorized by the treaty)**

188. It was observed that further clarification was required with regard to the distinction between "specified reservations" and non-specified reservations authorized by the treaty mentioned in draft guideline 3.1.4.

189. It was suggested that a paragraph should be added to draft guideline 3.1.2 providing that a reservation made to a treaty in order to exclude the compulsory jurisdiction of the International Court of Justice should not be considered as falling

within the definition of "specified reservations" for the purposes of draft guideline 3.1.

**(h) 3.1.3/3.1.4 (Reservations implicitly permitted by the treaty/Non-specified reservations authorized by the treaty)**

190. It was pointed out that these guidelines were unnecessary.

**(i) 3.1.5 (Definition of the object and purpose of the treaty)**

191. Several delegations welcomed the remarks of the Special Rapporteur on the topic (see A/CN.4/558/Add.1 and Corr.1) but agreed that the issue should be considered in more detail at the Commission's next session. The criterion of compatibility of a reservation with the object and purpose of a treaty was not applicable when a reservation affected a peremptory norm of international law directly or indirectly. That principle was important for the purpose of discouraging reservations to procedural rules that promoted monitoring of a State's compliance with substantive rule for the protection of a fundamental human right. Some delegations supported the Commission's cautious approach with regard to the definition of the object and purpose. Such a definition, despite the difficulty to word it in an objective manner, might be a useful guideline for the purpose of interpreting a specific international treaty in conjunction with the reservations made thereto. It was stated that a broad definition of the concept was commendable since it would enable the criterion of compatibility to the object and purpose to be applied on a case-by-case basis.

192. Some other delegations were sceptical about the value of seeking to define the concept of the "object and purpose" of a treaty in the abstract. But they found it useful to consider how it had been approached in individual cases in practice. In their view, guidelines going beyond the scope of a guide to practice and into the sphere of interpretation of the provisions on reservations contained in the Vienna Conventions should not be adopted since they could create various problems.

193. It was also pointed out that the term "raison d'être" found in the draft guideline provided little clarification, being as elusive as the term "object and purpose". A definition might not be necessary, since the terminology used in the Vienna Convention reflected established legal principles for the teleological method of interpreting of treaties. The practice of an increasing number of States, when objecting to reservations incompatible with the object and purpose of a treaty, was to sever the reservation in question from the treaty relation on the basis of the clear intent of article 19 (c) of the Vienna Convention that a reservation incompatible with the object and purpose of the treaty should not be permitted. However, it was observed that the terms suggested by the Special Rapporteur ("essential provisions", raison d'être) might provide only a temporary solution and could hardly eliminate subjectivity in making judgements.

194. It was stated that a reservation incompatible with the object and purpose of a treaty was not formulated in accordance with article 19, so that the legal effects listed in article 21 did not apply.

195. The view was expressed that the effects of a reservation and an objection should, as stipulated in article 21, paragraph 3, refer to reservations permitted under article 19. However, a reservation incompatible with the object and purpose of a

treaty should be considered invalid and without legal effect. An objection was not necessary in order to establish that fact. The objection therefore had no real legal effect of its own and did not even have to be seen as an objection per se; consequently, the time limit of 12 months specified in article 20, paragraph 5, of the Vienna Convention should not apply. However, in the absence of a body that could authoritatively classify a reservation as invalid, such as the European Court of Human Rights, such "objections" still served an important purpose.

196. The view was furthermore expressed that the practice of severing reservations incompatible with the object and purpose of a treaty accorded well with article 19 of the Vienna Convention. While an alternative to objecting to impermissible reservations was to exclude bilateral treaty relations altogether, the option of severability secured bilateral treaty relations and opened up possibilities of dialogue within the treaty regime.

197. The hope was expressed that if the guide to practice was to be widely used and accepted by States, constructive State practice would be reflected on the outcome of the work of the Commission and that a definition of the object and purpose would not narrow the scope of the compatibility criterion as understood in current practice or of the severability doctrine.

198. Other delegations thought that States parties, as guardians of a particular treaty, had a moral and legal obligation to object to a reservation contrary to the object and purpose of that treaty. A consistent practice should be developed in that field giving adequate consideration to what was and was not contrary to the object and purpose of a particular treaty. An administrative structure should also be established to facilitate the submission of objections within the time limit set by article 20 of the Vienna Convention on the Law of Treaties. It was also stated that the right to assess the compatibility of a reservation with a treaty, especially in the case of a reservation prohibited by the treaty, belonged solely to the States parties and should not be given to the depositary.

199. Contemporary treaties, in particular human rights treaties, contained a multitude of substantive rules, many of which were self-contained. When evaluating the impact of a reservation considered to be contrary to the object and purpose of a treaty, consideration should be given to whether the impact of the reservation would be limited to the provision itself or whether it would have a broader effect on the substantive content of a treaty. In the former case, there was no need to exclude the possibility of applying the remainder of the treaty between the reserving States and the objecting States. The premise was that, on balance, it was more attractive for the objecting State to enter into treaty relations, albeit limited, with the reserving State than not to enter into treaty relations at all. Article 21, paragraph 3, of the Vienna Convention had provided the flexibility required in contemporary practice but it had also given rise to a certain "random" approach by reserving States. In some cases, the objecting State had decided, despite the fact that the reservations made were of a very broad and imprecise nature, to enter into treaty relations with the reserving State. Moreover, the primary function of an objection had changed once the entry into force of the Vienna Convention on the Law of Treaties, to the effect that the political aspect of an objection played a central role, while its legal effects were becoming increasingly peripheral.

200. Some delegations agreed with the Special Rapporteur that "object and purpose" must be understood as one and the same notion rather than as two separate

concepts, and that that notion referred to the core obligations of a treaty. However, a degree of subjectivity was involved in determining these core obligations. It was observed that the object and purpose of the treaty should not necessarily be limited to the essential provisions of the treaty but also extend to relatively minor issues which might affect the balance of the overall text of the treaty. The concept of "basic structure" referred to in guideline 3.1.6 was also useful for the determination of the object and purpose.

201. The view was expressed that a reservation, incompatible with the object and purpose of the treaty, would ipso facto preclude the reserving State from becoming a party to the treaty. Any objection to such a reservation should indicate that the objecting State considered the reserving State as not being a party to the treaty in question. On the other hand, it was extremely doubtful that the practice advocated by the Nordic countries of severing incompatible reservations could be universally applied.

202. In accordance with another view, reservations incompatible with the "object and purpose" of a treaty should be considered as null and void and would invalidate the consent of a State to be bound by the treaty. The question remained, however, whether, in some instances, the acceptance of all contracting States of the reservation prohibited by the treaty could validate the reservation in question.

203. It was also observed that, in order to better define the object and purpose of the treaty, case law and doctrine should be taken into consideration.

**(j) 3.1.6 (Determination of the object and purpose of the treaty)**

204. The view was expressed that draft guidelines 3.1.5 and 3.1.6 should be merged since the criteria were more important than the definition.

**(k) 3.1.7 (Vague, general reservations)**

205. It was pointed out that a vague reservation was not always incompatible with the object and purpose of a treaty. While the practice of formulating vague, general reservations should be discouraged, the automatic qualification of such reservations as incompatible with the object and purpose of the treaty seems too severe. In such cases, it might be advisable to enter into a dialogue with the author of the reservation to clarify its compatibility. If the author refused to cooperate, in case of doubt the reservation would be considered contrary to the object and purpose.

**(l) 3.1.8/3.1.12 (Reservations to a provision that sets forth a customary norm/*jus cogens*/non-derogable rights/application of domestic law/general human rights treaties)**

206. Some delegations would prefer that the material in these guidelines be placed on the commentary, thereby reducing the risk of abuse if the reasons listed in them for characterizing a reservation as contrary to the object and purpose of a treaty were taken as limitative.

207. The view was expressed that draft guideline 3.1.9 (Reservations to provisions setting forth a rule of *jus cogens*) was superfluous.

208. The words "essential rights and obligations arising out of that provision" in draft guideline 3.1.10 (Reservations to provisions relating to non-derogable rights)

should be replaced by the words "object and purpose of the treaty", while the word "provision" in the second sentence should be replaced by the word "treaty" in order to conform to article 19 (c) of the Vienna Convention.

209. It was pointed out that draft guideline 3.1.11 (Reservations relating to the application of domestic law) should also take into account article 27 of the Vienna Convention on the Law of Treaties, to which it was closely related. It might also be useful to link this draft guideline with draft guideline 3.1.7 on vague, general reservations.

210. It was suggested that draft guideline 3.1.12 (Reservations to general human rights treaties) could be deleted since the distinction between reservations to human rights treaties and non-human rights treaties could cause confusion by offering different standards of compliance for reservations to different types of treaties.

**(m) 3.1.13 (Reservations to treaty clauses concerning dispute settlement or the monitoring of the implementation of the treaty)**

211. It was stated that it would be better to keep the issues of reservations and dispute settlement separate. If this guideline was retained, States would hesitate to participate in a treaty fearing that any reservation to the dispute settlement provisions might be considered as incompatible with the object and purpose of the treaty. According to another point of view, the provisions of this draft guideline represented a good balance between preservation of the object and purpose of a treaty and the principle of free choice of means of dispute settlement.

212. It was also stated that paragraphs (i) and (ii) could be deleted since reservations to dispute settlement(s) clauses had consistently been found not to be contrary to the object and purpose of a treaty within the case law of the International Court of Justice.

### 3. Question by the Commission

213. Several delegations commented on the question of the effect of objection to a reservation on the treaty relation between the objecting State and the State that made the reservation. Some delegations felt that, although the question touched upon a crucial and difficult matter, in practice the issue of compatibility with the object and purpose of a treaty arose in a relatively small number of rather extreme cases. When the reservation was not compatible with the object and purpose, the State could not be regarded as being a party to the Convention. As for the "super-maximum" effect of an objection, it was pointed out that this occurs only in the most exceptional circumstances, if, for example, the State making the reservation could be said to have accepted or acquiesced on such an effect.

214. It was observed that, when a State made a reservation in good faith and that the reservation was objected to by another State, it was expected that the provision to which the reservation related would not apply between the reserving State and the objecting State.

215. The objecting State could maintain treaty relations with the reserving State in respect of all other treaty provisions. Unless a third organ, such as an international court, decided the object and purpose of a treaty, it was usually for each individual State to decide such matters. A common understanding regarding the object and purpose of the treaty could be formed through the accumulation of instances of

objection, acquiescence and approval with regard to the reservation. Through its declaration of incompatibility of the reservation with the object and purpose of the treaty, the objecting State expressed its interpretation of the treaty which could influence other States' interpretations. The reserving State might also feel obliged to withdraw the reservation if the majority of States objected to it.

216. In some cases, the objecting State, however, objected to the treaty as a whole entering into force between itself and the reserving State.

217. The view was also expressed that the objecting State by conveying disapproval for a reservation incompatible with object and purpose of a treaty but still maintaining a treaty relationship with the reserving State — a paradoxical situation — would expect to open the way for a "reservations dialogue" by encouraging the reserving State to reconsider the need for or the content of its reservation. However, the objecting State could not simply ignore the reservation and act as if it had never been formulated ("super maximum effect"). That would compromise the basic principle of consent underlying the law of treaties.

218. While reservations which were incompatible with the object and purpose of the treaty were impermissible under article 19 (c) of the Vienna Convention on the Law of Treaties, an objecting State might determine whether it was desirable to remain in a treaty relationship with a reserving State, despite the existence of what it considered to be an impermissible reservation.

219. The point was made that a State formulating an incompatible reservation would continue to be bound by the treaty, especially when the treaty concerned human rights or environmental issues, since the aim of the States objecting to the reservation was to preserve the integrity of the treaty for the benefit of persons under the jurisdiction of the reserving State.

220. The view was also expressed that the Commission should encourage States to make more appropriate use of the formulas set forth in article 19 of the Vienna Convention.

221. It was also observed that States often objected under article 20, paragraph 4 (c), of the Vienna Convention and not under article 20, paragraph 4 (a). The expected legal effects were those resulting from article 21, paragraph 3 of the Vienna Convention. However the Commission's approach seemed to explore the possibility of States objecting to reservations for reasons other than the one provided for in article 19 (c) of the Vienna Convention. A "simple" objection might serve various purposes of a legal and political nature. A careful approach to the issue was required which would allow for sufficient flexibility so as not to discourage States from ratifying treaties.

222. According to another point of view, the only possible effect of an objection to a reservation incompatible with the object and purpose of a treaty was the public denunciation of the alleged invalidity of the reservation. Since the validity of a reservation did not depend on whether an objection was raised, the objection had no effect other than to manifest a disagreement between the reserving State and the objecting State as to the validity of the reservation.

223. It was also stated that a series of similar objections to the same reservation might be considered an element of subsequent practice within the meaning of article 31, paragraph 3 (b), of the Vienna Convention, providing a basis for deciding the

issue of validity. The accumulation of such objections might induce the reserving State to withdraw the reservation.

224. According to one view, when a State objected to a reservation because it believed it to be contrary to the object and purpose of the treaty, while not opposing the entry into force of that treaty in its relations with the reserving State, its intent was to manifest that it considered itself bound by the treaty as a whole vis-à-vis the reserving State and would not take into account a reservation incompatible with the object and purpose of the treaty.

225. According to another view, when a State considered that a reservation by another State was not compatible with the object and purpose of the treaty, the effect of the objection would be equivalent to the non-application of the treaty between the two parties. However, the paradox of States objecting to such reservations while maintaining treaty relations with the objecting State was due to a number of legal and political reasons (the wish to maintain a link with the reserving State, importance of leaving the door open to cooperation, the positive role of a collective opposition to a reservation with regard to achieving the withdrawal of the reservation, etc.). In any event, the question of the intended effects of such a practice was closely connected with the question of the effects of the objection itself and surrounded by the same ambiguity.

## H. Fragmentation of international law: difficulties arising from the diversification and expansion of international law

### 1. General comments

226. Delegations welcomed the work undertaken by the Study Group; its discussions had revealed the existence of certain problems regarding conflicting norms in the international legal order. The studies were not only of theoretical significance but also of major practical importance; they would contribute to a wider understanding of the overall coherence of the international legal system and enhance the use of various legal techniques for resolving conflicts in international practice, thereby advancing the rule of law.

227. It was suggested that the work on this topic might prove to be a good example of the kind of useful non-traditional work that could be included in the Commission's future work programmes. On the other hand, concern was raised regarding the inclusion of a topic, which was general and theoretical and differed greatly from the Commission's previous work, where it had dealt with the codification and progressive development of international law by formulating draft articles.

### 2. Methodology, work plan and projected outcome

228. Some delegations expressed support for the methodology of the Study Group, commending in particular the choice of the Vienna Convention on the Law of Treaties as the general frame of reference and the focus on the substantive as opposed to institutional aspects of the fragmentation. Furthermore, the Study Group's pragmatic interest in the various legal techniques employed by international judicial institutions for solving normative conflicts was also welcomed. Some delegations also endorsed the systemic approach in the studies, which emphasized

the nature of international law as a purposive system where the relationships between different rules could be established by means of legal reasoning.

229. On the other hand, the view was expressed questioning the wisdom of addressing only certain provisions of the Vienna Convention, in particular when other relationships between rules in the international legal system, such as integration, complementarity or subsidiarity also merited consideration.

230. Several delegations welcomed the Study Group's intention to conclude its work in 2006 and to formulate a set of practical guidelines, principles or conclusions. In particular, the proposal to reflect a practical orientation, while preserving the analysis provided in the background studies received support.

231. On the other hand, the Commission was urged to proceed with restraint in the adoption in 2006 of guidelines, principles or conclusions, whose status and content remained undetermined and uncertain. Moreover, to be of practical value, the proposed guidelines, principles or conclusions would have to be complete, a goal difficult to achieve, particularly for some of the studies. If the guidelines, principles or conclusions were to be an interpretation of the provisions of the Vienna Convention, they might be contrary to article 31, paragraphs 2 and 3 of the Vienna Convention in that they would neither be part of the context of the treaty nor of the supplementary means of interpretation. Concern was also raised that the application of such guidelines, principles or conclusions, in particular the treatment of inter-temporality, might lead to a partial modification of the rules contained in the Vienna Convention. It was recalled that the possibility of modifying treaties by subsequent practice had initially been proposed as article 38 of the draft articles on the law of treaties, but had later been rejected as likely to create uncertainty in treaty relations.

232. The view was also expressed that the topic did not lend itself to any kind of prescriptive outcome, such as guidelines or principles and that the Commission should confine itself to presenting an analytical study, which could include the conclusions of the authors of the individual studies where warranted and on which Governments might wish to comment.

### 3. Comments on the various studies being undertaken

#### (a) Function and scope of the *lex specialis* rule and the question of "self-contained regimes"

233. Some delegations took note of the Study Group's conclusion that the maxim *lex specialis derogat legi generali* should not lead to the extinction or total replacement of general law; a principle that seemed to be endorsed by the International Court of Justice in its advisory opinions on *Legality of the Threat or Use of Nuclear Weapons*[11] and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[12] In addition, while support was expressed for the overall conclusion as to the omnipresence of general law, it was pointed out that such conclusion might benefit from a more thorough consideration of the concept of general law.

[11] Advisory Opinion, *I.C.J. Reports*, 1996, p. 226.

[12] Advisory Opinion, 9 July 2004, reproduced in document A/ES-10/273 and Corr.1.

234. Also considered relevant by some delegations was the attention devoted to "prohibited *lex specialis*". Moreover, it was observed that while multilateral treaties which created an integral or interdependent regime or where subsequent practice of parties made it clear that contracting out was not allowed might give rise to problems of interpretation, recent examples, such as article 311 of the United Nations Convention on the Law of the Sea and the negotiations concerning the revisions[33] of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and its Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, were indicative of a general unwillingness to tamper with such regimes which carefully balance the rights and obligations of various States.

235. With regard to the term "self-contained regimes", support was expressed for the Study Group's suggestion that it be discarded as misleading. Instead, "special regimes" was more felicitous and would provide an adequate general framework within which such issues as "disconnection clauses" could be considered. In this context, the view was expressed that it was important to develop rules on the application of disconnection clauses and that treaties laying down the objectives of regional integration organizations were predicated on international law and had to be implemented in accordance with it. However, confidence was also expressed that the consideration of disconnection clauses would vindicate the main conclusion that special regimes have not seriously undermined legal security, predictability and equality of legal subjects. In addition, referring specifically to situations when the European Community joins a treaty together with its member States, it was stressed that disconnection clauses should not be a cause for concern; they applied only where the treaty provision coincided with that of the respective Community law and, therefore, did not call into question the scope or applicability of the treaty as such. Thus, such a situation should not be considered as leading to fragmentation of international law or as a negative phenomenon.

236. Concerning "regionalism", support was expressed for the approach taken by the Study Group that it should be treated within the general study on *lex specialis*.

### (b) Interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (article 31 (3) (c) of the Vienna Convention on the Law of Treaties), in the context of general developments in international law and concerns of the international community

237. It was pointed out that this study offered a valuable insight into the fairly frequent judicial use of the rule in recent years, and that the jurisprudence cited therein indicated both awareness of the risks of fragmentation and efforts to promote a consistent and coherent application of the law. The role of "other rules" in treaty interpretation seemed to have gained importance and, in this regard, some delegations welcomed the consideration in the study of customary law and general principles of law. At the same time, it was stressed that in the context of treaty interpretation, these other rules could neither diminish the scope nor change the substance of the treaty provisions. The objective of "systemic integration", endorsed by the Study Group, seemed a viable compromise for overcoming problems in this

[33] Amendments to the Convention and the Protocol were adopted on 14 October 2005 by the Diplomatic Conference on the Revision of the SUA Treaties, document LEG/CONF.15/21 and 22.

context. Adherence to the other rules of treaty interpretation was also considered essential.

**(c) Hierarchy in international law: *jus cogens*, obligations *erga omnes*, Article 103 of the Charter of the United Nations, as conflict rules**

238. Support was expressed for the Study Group's approach in this study, in particular regarding the decision not to produce a catalogue of norms of *jus cogens*, leaving the full content of their development to State practice, and the need to distinguish between the effect of Article 103 of the Charter and that of peremptory norms. It was also observed that the three norms considered were not homogenous and, in this regard, several delegations shared the Commission's conclusion that obligations *erga omnes* were more concerned with the scope of application rather than hierarchy. Alluding to the ICJ judgment in the *Barcelona Traction*[14] case, the view was expressed that the Court intended to limit obligations *erga omnes* to those arising under *jus cogens* norms. It was also noted that the emphasis in the study on the systemic perspective added an interesting element to the debate that powers of the Security Council were limited by peremptory norms and it was suggested that some further guidance on this question might be drawn from the judgement of the Court of First Instance of the EU in the *Yusuf* case.[15]

239. In the light of the uncertainty regarding what fell under the categories of *jus cogens*, obligations *erga omnes* and within Article 103 of the Charter, the point was made that general pronouncements about the relationship among those categories should be avoided. The importance of not adopting any rule that could be interpreted as limiting the primacy of Charter obligations or the authority of the Security Council was also emphasized. However, it was posited whether the relation between the primary and the secondary rules of an international organization would fall within the ambit of the study.

240. Furthermore, the need to preserve hierarchy in international law was stressed, and particular reference was made to the principle that a treaty was void if it conflicted with a peremptory norm.

## I. Other decisions and conclusions of the Commission

241. Some delegations made comments with regard to the Commission's work programme. It was said that the Commission was to be commended for its choice of those topics, which reflected current and important problems of interest to the international community. The importance of their codification for both the theory and practice of contemporary international law could not be overestimated. It was noted that the agenda of the fifty-seventh session of the Commission had been extremely rich and significant progress seemed to have been achieved on all topics. There was thus every reason to think that by the following year — the last of the quinquennium — the members of the Commission would be leaving a heritage of topics well on their way towards completion by their successors.

[14] *I.C.J. Reports*, 1970, p. 3.

[15] *Yusuf and Al Barakaat International Foundation v. Council and Commission*, 21 September 2005, OJ C 281, 12.11.2005, p. 17.

242. A comment was also made that the Commission's impressive attainments in the sphere of the codification and progressive development of international law, which had resulted in the drafting of numerous seminal international agreements of a universal nature, meant that it should be given optimal working conditions. Its sessions should not therefore be curtailed. Similarly, it would be advisable to restore the practice of paying special rapporteurs a fee.

243. Some delegations welcomed the inclusion of the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", which bore on the implementation of a number of conventions on the suppression of international crime and terrorism. It was stated that the analysis of this topic should take into account the principle of universal jurisdiction in criminal matters. The growing practice, especially in recent years, of including the obligation to extradite or prosecute in numerous international treaties and its application by States in their mutual relations raised the question of unification of different aspects of the operation of that obligation. Among the most important problems requiring urgent clarification was the possibility of recognizing the obligation in question not only as a treaty-based one but also as one having its roots, at least to some extent, in customary rules.

244. Several delegations also commented on the long-term programme of work of the Commission. It was stated that, at a time of reform in the United Nations, the Commission's standard-setting role was crucial. In this context, a suggestion was made that the Sixth Committee should consider whether the Commission should be requested to examine various important topics that had arisen in connection with the United Nations reform, such as the responsibility to protect. Support was also expressed for the inclusion of topics of law applicable to humanitarian assistance in the event of natural disasters.